

## Update September 2020 - Holidays Over, Work Can Start?

Even though many employers and employees have now found their way around the "new normality", "Corona" continues to raise new questions in the employment relationship.

**Current:** What is the consequence of an (avoidable) trip to a risk area that entails a quarantine?

Until now, such a quarantine could be avoided or ended by a negative test, which could even be carried out shortly before entering Germany. However, from October 1, 2020, a new regime for post-return quarantine from risk areas is planned, which can be terminated by a negative test on the 5th day after return at the earliest. This means that in any case, returnees from risk areas will have to stay away from their place of work for at least five days after their return.

After Federal Minister of Health Jens Spahn recently stated that a claim for compensation under sect. 56 para. 1 of the German Infection Protection Act (IfSG) also exists if an employee had travelled to a risk area contrary to public warnings, the Federal Chancellor and the heads of the federal governments recently decided that a nationwide legal amendment should be brought about under which compensation for loss of income would not be granted in such cases.

The planned amendment to the law is in line with the legal opinion already prevailing. However, immediate implementation is to be welcomed in order to assure clarity and legal certainty for both employees and employers. Until a clear legal regulation is in place, the following applies:

If the employee is unable to appear for work due to a quarantine obligation, it is impossible for him to fulfil his contractual obligations arising from the employment relationship (sect. 275 para. 1 German Civil Code (BGB)), with the consequence

that he is no longer entitled to remuneration (sect. 326 para. 1 1<sup>st</sup> sentence BGB). Other provisions only apply if the quarantine obligation results from a business trip.

### **Knowingly off to the Risk Area**

If an employee deliberately travels to one of the currently 160 countries that have been declared, in whole or in part, as a risk area for a private trip, this decision excludes a claim to continued payment of remuneration pursuant to sect. 616 BGB or sect. 56 IfSG.

The employer can also - if no milder means such as remote working is available - demand a corona test from the employee in order to end an ordered quarantine prematurely. If the employee refuses because of the (minor) physical interventions associated with a test, unpaid leave should be the correct consequence.

### **Unpleasant Surprise at the beach**

In the case that an employee has travelled to a "green" country or area which becomes "red" while being there (current cases: **Spain, Brussels, Croatia, etc.**), there is no fault on part of the employee. However, in this situation the German Civil Code obliges the employer to continue to pay remuneration only in limited number of cases:

In principle, sect. 616 BGB only covers cases in which an employee is prevented from performing work for a "relatively insignificant period of time". This is not the case with a two-week quarantine. Sect. 616 BGB covers periods of a few days only - the limit is usually drawn at a maximum of five working days. Once this threshold is exceeded, a claim under sect. 616 BGB does not arise for a relatively short period, but not at all.

However, the situation is different if the employee undergoes a corona test after returning from the risk area and only has to wait a few days for the test result. In

this case, a claim for continued payment of remuneration against the employer pursuant to sect. 616 BGB may arise.

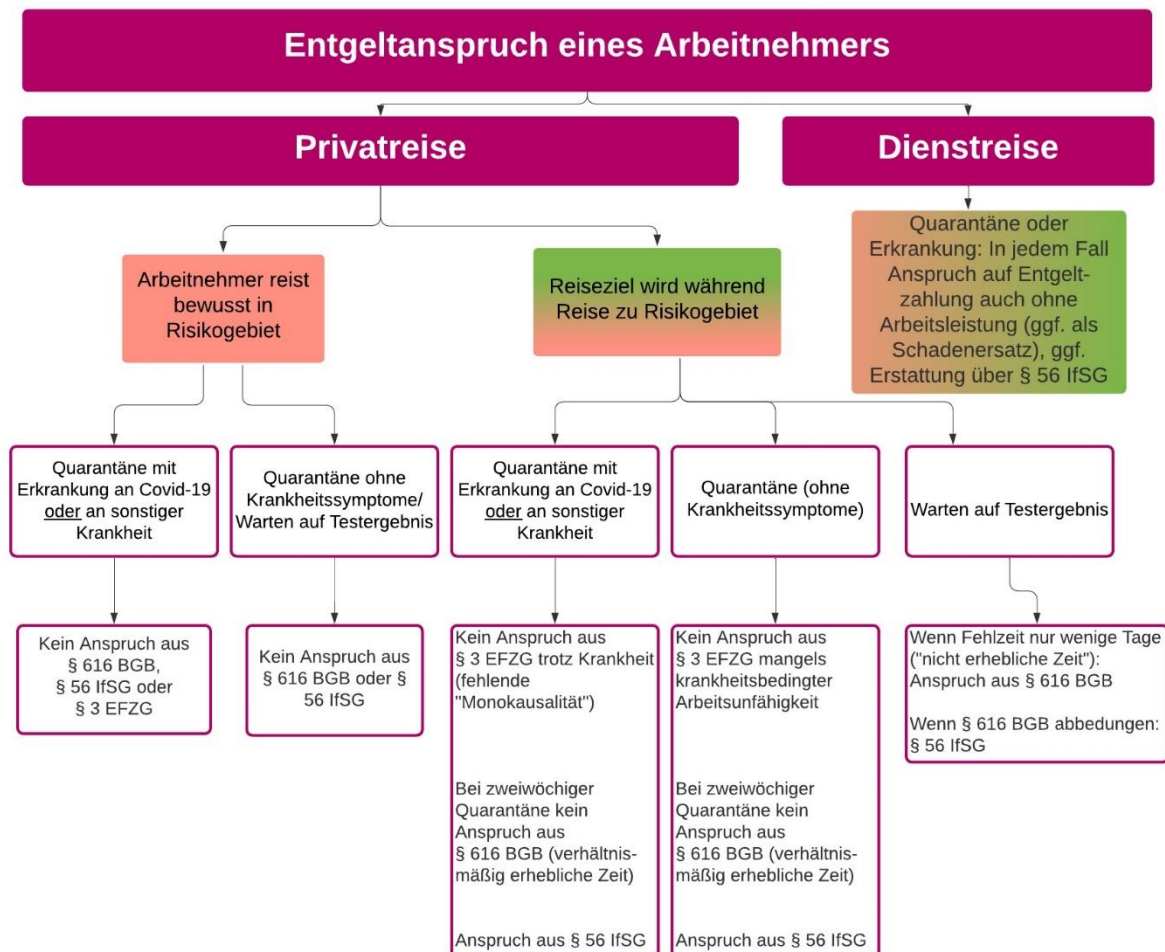
Often, the provisions of sect. 616 BGB are abrogated anyway by employment contract, works agreement or collective agreement. In this case, and also if a claim under sect. 616 BGB does not exist due to the long absence, sect. 56 IfSG applies. According to this provision, the employer must pay the employee compensation equalling the owed remuneration for a maximum of six weeks (from the seventh week on only in the amount of statutory sick pay), but can recover the costs from the state (sect. 56 para. 5 IfSG).

### **Sick in Quarantine**

Even if the employee falls ill during a quarantine not caused by a business trip - be it from corona, or e.g. appendicitis - the employer is not held to continue to pay remuneration pursuant to sect 3 para. 1 Continued Remuneration Act (EFzG). This is because this requires so-called "monocausality", i.e. that the incapacity for work must only be caused by the illness. In case of a simultaneous quarantine obligation, this is not given. Besides, this applies in both cases: if the employee has deliberately travelled to a risk area and if his destination has subsequently been declared a risk area. For business trips ordered by the employer, on the other hand, completely different rules may apply - here the employer will be liable for the consequences caused by the business trip.

At a glance:

(Graphic only in German language. Feel free to get in touch for further questions.)



Source: RITTERSHAUS Rechtsanwälte

## And Finally, Family Joys: Child in Quarantine

The suitcases are unpacked and the joy to see the colleagues again is great - but what if your own child is not allowed to go to school because it has been quarantined? In this case, a claim for compensation in the amount of the remuneration arises under sect. 56 para. 1 a IfSG. This entitlement, however, only exists if a reasonable care cannot be ensured by any other means. According to the explanatory memorandum to the German Infection Protection Act, this could be the case, for example, if there is a claim to so-called emergency care in the day care centre/school, if the other parent can be called upon or if other family members

willing to do so can take care of the child - of course not if they are considered to be at high risk.

If you have any questions or need advice, please contact lawyer [Charlotte von Erdmann](mailto:charlotte.erdmann@rittershaus.net) (<mailto:charlotte.erdmann@rittershaus.net>) and lawyer [Eler von Bockelmann](mailto:eler.bockelmann@rittershaus.net) (<mailto:eler.bockelmann@rittershaus.net>).

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